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FEDERAL COMMUNICATIONS COMMISSION
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May 18, 2004

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EX PARTE COMMUNICATION

Marlene H. Dortch, Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W., TW-A325
Washington, DC 20554

**Re: Request to Update Default Compensation Rate For Dial-Around Calls from
Payphones, WC Docket No. 03-225**

Dear Ms. Dortch:

The American Public Communications Council ("APCC") hereby replies to AT&T's ex parte letter dated May 5, 2004 ("AT&T Letter"), in which AT&T requests the Commission to revise, as part of these proceedings, the per-payphone dial-around compensation rate that applies when interexchange carriers ("IXCs") do not pay compensation on a per-call basis. See 47 CFR § 64.1301(e).¹ AT&T requests the Commission to "solicit new, comprehensive, up-to-date and representative data from the [incumbent local exchange carriers ("ILECs")] and other [payphone service providers ("PSPs")] on average call volumes" and "use these data to calculate a new, lower per-payphone compensation rate"

APCC has no objection in principle to revision of the per-payphone compensation rate. We note, however, that a very small percentage of payphones currently receive per-payphone compensation payments.² The Commission must not

¹ The primary purpose of the per-payphone compensation rate is to ensure that PSPs are fairly compensated when their payphones are attached to payphone lines that are still incapable of transmitting the "FLEX ANI" information digits that enable interexchange carriers to track calls originating from "smart" payphones. *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Fourth Order on Reconsideration and Order on Remand, 17 FCC Rcd 2020, 2021 n. 5, 2033-34 (2002) ("Fourth Reconsideration Order").

² The number of payphone lines that cannot transmit FLEX ANI has declined more or less steadily over time. See FCC's Brief for Respondents at 37, *AT&T Corp v FCC* (D.C. Cir., No. 03-1017, initial brief filed November 13, 2003) ("FCC Brief") ("Ultimately,

allow this rather minor issue, raised for the first time at this late date -- almost two years after initiation of these proceedings, over a year and a half after the Commission action of which AT&T complains, and over five months after AT&T was explicitly advised, by the Commission's brief on review of the *Fifth Reconsideration Order*, that AT&T needed to raise this issue in this proceeding -- to delay in any way the prescription of a new per-call compensation rate pending review of the per-payphone rate. The Commission should proceed immediately to prescribe a revised *per-call* rate. Then the Commission may want to issue a public notice requesting updated information on the per-payphone rate.

The Commission set the per-payphone compensation rate of which AT&T complains in the *Fifth Reconsideration Order*, released October 23, 2002. A few weeks earlier, on August 29 and September 4, 2002, APCC and the RBOC Coalition had filed petitions for revision of the per-call compensation rate. As soon as those petitions were placed on public notice on September 30, 2002, AT&T was on notice that the compensation rate would be reopened. See *Wireline Competition Bureau Seeks Comment on Petitions for Rulemaking Regarding Payphone Dial-Around Compensation Rate*, RM No. 10568, Public Notice, DA 02-2381 (Sept 30, 2002). AT&T could have and should have immediately requested that the per-payphone compensation issue be revisited in this rulemaking. Moreover, as AT&T acknowledges, shortly after formally initiating this rulemaking³ the Commission specifically notified AT&T, in its November 13, 2003 brief⁴ on review of the per-payphone compensation rate, that "it makes sense" to request a modification of the per-phone rate in this proceeding. AT&T Letter at 2, quoting FCC

(Footnote Continued)

this whole argument with respect to prospective [per-phone] payments is overblown"), citing *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Fifth Order on Reconsideration and Order on Remand, 17 FCC Rcd 21274, 21275, ¶ 4 (2002) ("*Fifth Reconsideration Order*") ("the vast majority of payphones now transmit the appropriate coding digits"). Currently, APCC Services' PSP clients receive per-payphone compensation for only about 13,000 payphones out of a total base of well over 300,000 payphones represented by APCC Services. Because local exchange carriers ("LECs") use predominantly "dumb" payphones for which the central office provides hard-coded payphone-identifying digits, so that FLEX ANI identifiers are not required, APCC believes the number of LEC payphones receiving per-payphone compensation is even less. Overall, APCC estimates that only 1-2% of all payphones currently receive per-payphone compensation.

³ *Request to Update Default Compensation Rate For Dial-Around Calls from Payphones*, Notice of Proposed Rulemaking, WC Docket No. 03-225, FCC 03-265 (rel. Oct. 31, 2003) ("*NPRM*").

⁴ In its citation of the FCC brief, AT&T incorrectly gives the date of the brief as April 16, 2004 (which is actually the date of the court decision upholding the *Fifth Reconsideration Order*). Due to this incorrect citation, AT&T avoids acknowledging that it has been on notice for six months of the need to request a modification of the per-payphone rate.

Brief at 37. In any event, as the court of appeals specifically found, the issue of the per-payphone rate "was on the table" from 1996 onward and AT&T and other parties "had a duty to inform the Commission of any change in conditions they thought warranted a rate adjustment." *AT&T v FCC*, __ F.3d __ (D. C. Cir., No. 03-1017, April 16, 2004), slip op. at 10. Instead, AT&T delayed requesting a revised per-payphone compensation rate until 18 months after its first opportunity to do so and more than six months after the Commission issued the *NPRM* in this proceeding and formally placed AT&T on notice of the need to request an update of the per-phone compensation rate if it wished to have a new rate prescribed in this proceeding.

Further, as AT&T admits in its letter, since early 2002, it has been aware of information that, according to AT&T, would enable the Commission to prescribe a lower per-phone compensation rate. See AT&T Letter at 3 & n.2 (describing various RBOC filings in the first quarter of 2002 that allegedly yield "an absolute ceiling on average call volume of only 116 calls per month"). Thus, AT&T has not only been on notice for six months that it should request a modification of the per-phone rate in these proceedings, but it has also had access for at least two years to information that would enable it to propose a new rate

Fundamental fairness, as well as Section 276 of the Communications Act, 47 U.S.C. § 276(b)(1)(A), require the Commission to promptly conclude its evaluation of the per-call compensation rate. The PSPs have been waiting 20 months for the prescription of a new dial-around compensation rate. AT&T should not be allowed to delay revision of the per-call compensation rate by its insertion of the per-payphone compensation rate into this proceeding at this late date.⁵

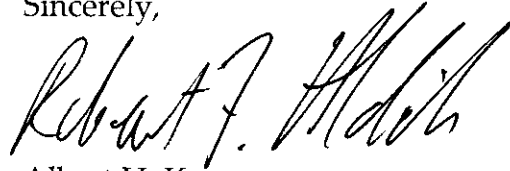
The prescription of a revised per-call rate prior to revising the per-phone compensation rate will not prejudice the outcome of the per-payphone compensation issue. Indeed, the per-call compensation rate is one element of the per-payphone compensation rate; therefore, the Commission must determine a per-call rate before it can determine a per-phone rate.

⁵ AT&T has already engaged in substantial self-help to alleviate the consequences of the per-payphone rate set in the *Fourth Reconsideration Order* and *Fifth Reconsideration Order*. Immediately after the *Fifth Reconsideration Order*, AT&T took steps that effectively prevented any increase in AT&T's compensation payments resulting from the modified per-phone rate. AT&T ceased requiring the transmission of "Flex ANI" digits in order to pay per-call compensation for calls originating from "smart" payphones, and made a number of other changes to its "business rules." As a result, the number of APCC Services-represented payphones for which AT&T paid per-phone compensation dropped by more than 70% in a single quarter. In other proceedings, the FCC has condemned such "arbitraging" of applicable compensation rules. See, e.g. *Local Competition Provisions in the Telecommunications Act of 1996*, 16 FCC Rcd 9151 (2001). APCC expects that, if the Commission reduces the per-payphone compensation rate, the Commission will not permit AT&T and other IXC's to adopt changes in their business rules that increase the number of payphones subject to the per-payphone rate.

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Accordingly, the Commission should promptly prescribe a revised per-call rate. Then the Commission may want to issue a public notice requesting updated information on the per-payphone rate.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert F. Aldrich". The signature is fluid and cursive, with the first name "Robert" and last name "Aldrich" clearly distinguishable.

Albert H. Kramer
Robert F. Aldrich

cc: Jeff Carlisle
Tamara Preiss
Jon Stover
Carol Canteen